(1) Supreme Court, U.S.
FILED

No. 01 474 SEP 12 2001

IN THE
Supreme Court of the United States

John Caldwell Timmons, *et al.*
Petitioners

v.

Timothy Scott Cassell, *et al.*
Respondents

On Petition for a Writ of Certiorari
To The United States Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

John Caldwell Timmons
Petitioner pro se
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Questions Presented for Review

Cassell serially filed a second Chapter 13 reorganization shortly after the first was dismissed. Two appeals have been taken from orders issuing from the second reorganization. Both appeals dealt with the claim of the Timmons Heirs even though the second appeal also addressed the sanctions that were levied for alleged violations of Bankruptcy Rule 9011.

1. Would the decisions reached in *Timmons v. Cassell* (Sixth Circuit), conflict with the decision reached in *Lindsey v. Normet* (U.S. Supreme Court) and *Thompson v. Shoemaker* (North Carolina Court of Appeals)?

2. Would possession of a rental structure determine liability for delinquent rental payments to the exclusion of subjective "habitability" standards?

3. Would Ohio Revised Code §§ 5321.04(A)(2) and (4) impose a defense, in a non-payment of rent issue, if the tenant failed to comply with Ohio Revised Code §§ 5321.05 and 5321.07?

4. Would the withholding of rent, after a Chapter 13 Petition in Bankruptcy is filed, conflict with averred principles of law as presented in Restatement, 2d, Property, Landlord and Tenant, §21.1?

5. Would the withholding of rental payments during the pendency of a first reorganization constitute bad faith or fraud and thus be controlled by USC Title 11 § 523 (a)(2)(A) in the second reorganization?

6. Would broken windows and damages arising from the failure to maintain heat in a rental dwelling constitute wilful and malicious destruction of property and thus be controlled by USC Title 11 § 523 (a)(6) in a serial Chapter 13 Reorganization?

PARTIES TO PROCEEDING

Pursuant to S.Ct. Rule 14.1(b), Petitioners supply the following list of parties in interest for this Petition:

Petitioners pro se

Timmons Heirs

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Respondents

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PETITION FOR A WRIT OF CERTIORARI

CITATIONS TO OPINIONS BELOW

Pursuant to S. Ct. Rule 14.1(d), Petitioner submits that no publication has been made of the decisions of the Bankruptcy Appellate Panel or of the Sixth Circuit. Electronic citation has been made for the Reversal of the Sanctions Order by the BAP and is found at:

Court of Appeals. ELECTRONIC CITATION: 2000 FED App. 0011p, (6th Cir.), File Name: 00b0011p.06

JURISDICTIONAL STATEMENT

This is a Petition for Certiorari in regard to a decision of the United States Court of Appeals for the Sixth Circuit entered on June 15, 2001. No party has sought rehearing or any extension of time to file this petition. Review of the Bankruptcy Court's orders on the Timmons Heirs' claim is based upon an "abuse of discretion" as well as a "clearly erroneous review of finding of facts and improper conclusions of law" as delineated by bankruptcy rule 8013 and Federal Rule of Civil Procedure 52(a).

Two orders issued from the bankruptcy court in regard to the claim of the Timmons Heirs. The first order established the claim at $459.00 and that judgment was subsequently affirmed by the Bankruptcy Appellate Panel (BAP) and again by The United States Court of Appeals for the Sixth Circuit (6th Circuit). Prior to the BAP's affirmation of the first claim order, the bankruptcy court issued a second order that levied sanctions for alleged violations of Bankruptcy Rule 9011 and reduced the claim of the Heirs to $0.00.

This second order was reversed on appeal by the BAP. Even though the sanctions were reversed, and superficially it would appear that the Timmons Heirs had won, they continued with an appeal from the BAP decision on the second order. The BAP had failed to address the claims portion for the second order, and indicated that this issue had been resolved and affirmed in their decision rendered for the first appeal. However, the Heir's reasoned that if the second order was a final order that sanctioned as well as established the Heirs' claim, then the first claim order must have been interlocutory and was not a final appealable order.

The Sixth Circuit affirmed the first claim order as the controlling order in the second appeal but affirmed the Bankruptcy Appellate Panel's reversal of the second order. It would seem that the first claim order, like Lazarus, has now risen from the dead. Affirmation by the Sixth Circuit thus confers the jurisdiction for the resolution of this controversy in the United States Supreme Court pursuant to 28 U.S.C. § 1254(1) and S. Ct. Rule 10(a) and 10(c).

STATUTORY PROVISIONS INVOLVED

Pursuant to S. Ct. Rule 14.1(f), Petitioners have set out in full text the cited portions of The Ohio Revised Code, The United States Code, and various selections in the Appendix; at 37a – 50a

History

Timothy Scott Cassell is a United States Mail Carrier. In 1992, he rented a dwelling owned by the Timmons Heirs for the month to month payment of $250.00. The property was an older farmhouse south of Columbus, Ohio and situated on a dirt and gravel lane about two thousand feet from U.S. Rt. 23, a principal highway. The house has a partial basement,

with access from the outside, four large rooms and a bathroom on the first floor, with three bedrooms on the second floor. The age of the house is unknown, but a submersible pump supplied the house from a drilled well. The kitchen had a sink and cabinets, a modern bathroom had been added about 1970, and about 1971 a forced air, fuel oil furnace had been installed in the basement with ductwork and warm air registers for the first floor. However, the windows and doors were not completely air tight, some bricks had fallen from a chimney, some wooden steps for the front porch had deteriorated (later removed), and a porch floor had begun to sag.

John Timmons, one of the Timmons Heirs, acted as agent for the family and pointed out the defects to Cassell and a verbal lease was negotiated with a monthly rent established at $250.00; a price below market but with an allowance to compensate for the presumed higher heating costs. Possession of the property was transferred to Cassell without the requirement of a security deposit. Shortly after Cassell moved into the house, and without a rent increase, John Timmons purchased a modern airtight wood burning stove that was installed on the first floor.

About 1996, the bathroom roof had started to leak and was repaired although the damaged plasterboard in the bathroom was not replaced. In May of 1998, Cassell informed John Timmons that the bathroom floor was sagging. An agreement was made at this time that if Cassell paid up his delinquent rents and remained current with future rental payments, then Timmons would repair the floor and plasterboard. There was also an agreement to increase the monthly rental rate to $300.00.

In June of 1998, Cassell paid some of the delinquent rents and Timmons thereupon asked a local contractor to inspect the house and submit an

estimate for repairs. His report stated that the joists and subfloor were rotted and a completely new floor was needed. The cause was attributed to a pipe that had frozen and split and was now spraying water on the substructure.

Timmons asked for the balance of the rent in July but was informed that Cassell had contacted a lawyer and would need to file a bankruptcy by the end of the month and that Timmons would be included as a creditor. In August, Cassell informed Timmons that the reorganization had been delayed but would be filed soon. Two weeks later, Cassell informed Timmons that the Chapter 13 Petition had just been filed. In another two weeks, Timmons again asked for the rent and asked why notice had not been received; Cassell stated that he would check with his attorney. A subsequent explanation was that the attorney had forgotten to include Timmons on the List of Creditors but would immediately modify the Petition to rectify the oversight. Subsequent attempts to secure the rent were met with hostility and contempt and even a demand that Timmons get off the front porch. Further attempts to secure the rent and to determine the status of the reorganization proved just as fruitless and on December 29, 1998, Timmons filed a Motion to Dismiss for Case Number 98-57642 that had been filed August 10, 1998.

Cassell was absent from the property for three or four days at the beginning of 1999; this period proved to be one of the winters coldest. Cassell was again absent from the property at the end of January 1999. However, his personal property was left in the house.

At the Dismissal hearing, held March 3, 1999, it was determined that no payments had been withheld from Petitioner's wages and no payments had been made to creditors. The court dismissed the case for nonperformance pursuant to a motion to dismiss

made by the trustee. Immediately after the hearing, Timmons asked Cassell for the key so that he could have possession of the house and thus begin cleanup and repairs. Cassell stated at this time that he still had personal property in the house and it was for him to decide when the house was to be returned. Cassell filed his second Petition for Reorganization under Chapter 13, Case No. 99-52491, on March 22, 1999.

On April 30, 1999, Timmons received a phone call from Cassell informing him that he had removed his personal property and that the key to the house was in his mailbox. An inspection of the house, the next day, found considerably more damage than had been observed the previous summer. The upper tank and the lower bowl of the commode had frozen and now lay in pieces, the wastewater traps were split and, when electricity was restored, it was discovered that the plumbing had burst due to freezing. Twelve broken windowpanes were discovered with broken glass outside the house (plastic had been used to cover the window sashes), and the bathroom floor was in much worse condition than in the previous summer. A hurried estimate was obtained for various repairs and John Timmons did submit a claim on the bar date for the sum of $7,750.00 dollars.

The court determined at hearing that Timmons was not licensed to practice law and could no longer submit documents for the Timmons Heirs. It was held that John C. Timmons could represent himself but the other two partners (siblings), Ann Timmons Root and Pryor Brown Timmons Jr., would either need to personally appear or would need to have representation.[1] The Timmons Heirs did file an

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[1] John Timmons was dismissed from a pro se Chapter 12 Reorganization, by this court. The dismissal was allegedly attributed to "bad faith and a lack of feasibility." Evidence of illegality or fraud was never introduced and the allegations were predicated solely upon the "hardship" that

amended claim for the sum of $6,173.45 and did appear together at subsequent hearings.

A hearing was held on the claim of the Timmons Heirs that resulted in the order that denied back rent and damages. The clean up costs and broken windows were attributed to Cassell for an allowed claim of $459.00. A hearing was held on the Heirs' Motion for Reconsideration and the Defendant's Motion for Sanctions and Attorney fees. The Heirs presented the defense that they had submitted an amended claim with attached receipts (also indicating that all work had not as yet been completed) and the position that the continued possession of the house by Cassell determined his liability for accrual of rent. The Court failed to accept these arguments which eventually resulted in the ensuing appeals.

STATEMENT OF THE CASE

This Supreme Court is now being asked, by the Petitioners, to resolve issues that seems to be intensifying in landlord-tenant relationships. Is that relationship still dominated by the common law that treats the lease as a conveyance of a property right or, shall the lease now be considered as a contract? Conveyance of a property right, with the transfer of possession, infers that the covenants to pay rent and to maintain and repair are separate and independent. If the lease is now contractual in nature, then implied warranties of habitability emerge with dependent and contingent covenants for rent payment from the tenant

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might be imposed upon one creditor. The previous reorganization lasted for a duration of five years. Appeals of the dismissal order and a claims order were fruitlessly pursued to the 6th Circuit Court. The legality for using a bankruptcy "claims order" in a Judgment Decree In Foreclosure for a first mortgagee was pursued in state court and appeared at the U.S. Supreme Court as Case No. 97-969 (cert. denied).

and the covenant to maintain and repair by the landlord. In some jurisdictions, tenants have recently been given the right to withhold rents and the courts seem more inclined to impose penalties for failing to maintain a standard of habitability that is increasingly ratcheting upward

Failure to pay rent is a breach that oftentimes terminates a lease with an accompanying eviction in state court. Grounds for an eviction in Ohio are spelled out by Ohio R.C. 5321.03 (1) for failure to pay rent, and (2) for lack of reasonable care on the part of the tenant who has complained to legal authorities of housing code violations that are in fact attributable to the complaining tenant. (Text at 36a). Eviction alone does not necessarily terminate the landlord-tenant relationship in Ohio because either party is entitled to bring a second action pursuant to Ohio R.C. § 5321.12 for recovery of damages. This allows an action for breach of contract or breach of any duty that is imposed by law (usually for unpaid rents but also for damages sustained by the lessee). (Text at 36a)

The landlord forfeits a future benefit in the stability of a lease for the right to regain possession through a state court's Forcible Entry and Detainer action. The resulting eviction restores possession of the property to the landlord and limits his losses to one or two months of uncollected rent. The landlord, pursuant to Ohio R.C. 5321.12(1), can initiate a second action to recover unpaid rent plus any damages that can be attributed to the renter. In reality, however, the landlord often absorbs the lost rentals and repairs the damages without further reliance upon the courts. An action to seek and collect on a judgment is usually not worth the effort. The evicted tenant likewise is penalized; his reputation is exposed to, and suffers, public scrutiny and subsequent attempts to secure decent housing may be compromised.

Landlord-tenant Law

The Heirs believe that their claim against Cassell is just and equitable and must be resolved by a correct analysis of Constitutional, Federal, and Ohio law. Not only should the damages and back rent be awarded, but they should not be discharged in bankruptcy. The Heirs believe that Cassell's decision to stop paying rent was made before the petition date for the first reorganization and after he had decided to move from the property. It can be hypothesized that Cassell decided that he would wait to be evicted or, more probably, with knowledge of USC Title 11 § 362, the automatic stay[2] (Text at 41a), resolved to maintain possession as long as possible. This can be viewed as a fraud that should not be encouraged or assisted by the bankruptcy courts. The denial of discharge of debt perpetrated and acquired by fraud is addressed by United States Code (U.S.C.) Title 11 § 523 (a)(2)(A) (text at page 39a). The damages to the house were either wilful destruction or inexcusable negligence on the part of Cassell and also should not be discharged in bankruptcy. The denial of discharge of debt for wilful and malicious injury or damage is addressed at U.S.C. Title 11 § 523 (a)(6) (text at 42a).

The applicable Federal position for the landlord-tenant relationship after a lessee files for bankruptcy protection is best found in Restatement, 2d, Property, Landlord and Tenant §21.1 (Text at 42a). This "Black Letter of the Law" does not equivocate about treatment in the event of a bankruptcy of the lessee. Here the landlord can retake possession (if the lease is rejected), collect the pre-petition and post-petition rents, and

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[2] John Timmons was also cautious of the Automatic Stay because of previous interactions with this court and with the bankruptcy trustee whom he had subpoenaed in order to obtain cancelled checks for his defense in the foreclosure action in state court. However, Timmons did not receive all checks.

recover damages allowed by the bankruptcy act. No mention is made of a need to prove fraud or malicious damage; the recovery is automatically allowed.

The United States Supreme Court, on review of Oregon's Forcible Entry and Detainer law, previously addressed the Constitutional issue in *Lindsey; Lindsey v. Normet*, United States Supreme Court, 405 U.S. 56 (1972):

> "We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease, without the payment of rent or otherwise contrary to the terms of the relevant agreement. Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions. Nor should we forget that the Constitution expressly protects against confiscation of private property or the income therefrom."

The Uniform Residential Landlord-Tenant Act (URLTA) was enacted in 1972 and is the codification of the landlord-tenant relationship at the Federal Level. The Ohio Residential Landlord tenant Act was patterned after the URTLA and became part of the Ohio Revised Code (O.R.C. or Ohio R.C.) in 1974. It retains its foundation in the common law; the covenant to pay rent and the covenant to maintain and repair are separate and not contingent. Ohio R.C. § 5321.04 (text at 38a) delegates the responsibilities of the landlord while Ohio R.C. § 5321.05 (text at 39a) describes the duties of the tenant. The landlord is

required to maintain and repair ordinary wear and tear whereas wasting of the premises by the tenant, either intentionally or negligently, may result in eviction and a secondary action for recovery of damages attributable to the tenant.

The courts below have directed their attention to the alleged condition of the property as portrayed by the debtor Cassell: (The house) ---"was in an unfit condition and the water damage resulted from the age of the home and landlord neglect. Further, Ohio landlord tenant law supports the bankruptcy court's conclusion that the debtor was not liable for rent or for damage to the property based upon its unfit condition. See Ohio Rev. Code § 5321.04(A)(2) and (4)." *Timmons v. Cassell*, 6th Circuit Opinion, (text at 4a); "----the Debtor did not have to pay any rent because of the property's poor condition, which the court attributed to the Heirs." *In re Cassell*, No. 99-52491, BAP Opinion (text at 8a). "Third, the court found that, given evidence of the long standing abysmal, uninhabitable condition of the home, and its age, that all other charges for the claimed repairs were derived from the neglect of the Timmons Heirs as the Debtor's landlords." *In re Cassell*, bankruptcy court's Order Imposing Sanctions, (text at 31a). "Finally, a reasonable inquiry on the part of the Timmons Heirs should have included some knowledge and recognition of the extremely poor condition of the home to determine what damages could fairly be attributed to the debtor." *In re Cassell*, bankruptcy court's Order Imposing Sanctions, (text at 33a).

It is often said that beauty lies in the eye of the beholder and that one persons junk is another persons treasure. The Timmons Heirs wish to assert that the condition of the premises should have no bearing upon Cassell's failure to pay rent. The structure is an older farmhouse but it should never be considered

"abysmal".[3] Nor was the property "uninhabitable" at the time of the inspection made in June of 1998 when Timmons agreed to remedy provided Cassell pay the delinquent rents. Cassell had inspected the property in 1992, before he had agreed to the $250.00 per month rent, and it may be assumed, because of this reasonable rate, that the property was "worthy of its hire". The furnace worked properly at this time and previous tenants had not had a problem with frozen plumbing.

Claims hearing

On November 23, 1999, a hearing was held on the debtor's objection to the claim of the Timmons Heirs. During his testimony, Cassell stated that he had various suppliers furnish heating oil for the furnace but he sometimes brought his own fuel (in five-gallon cans). He testified that 150 gallons would heat the house for about one month. Further testimony revealed that the furnace had not been working for the last four or five years and that his main source of heat had been the wood stove with supplemental heat from electric and kerosene space heaters that heated the first floor (transcript selection at pg. 43a).[4].

Cassell then testified that he had experienced frozen pipes from the beginning and had become quite

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[3] Notice should be taken that John Timmons repaired the plumbing and the bathroom and has now taken up residence in the home formally occupied by Cassell. Although the house requires expenditure of more money for fuel in the winter, the location, access to a large barn and several outbuildings, the increased size of the house, and a large lawn were reasons to consider the premises superior to the house that he occupied next door (100 yards away).

[4] It must be assumed that Cassell blamed Timmons for the furnace not functioning properly even though Cassell never reported the malfunction.

adept at removing sections and replacing them with new pipe. He acknowledged that the commode had frozen and broken in January of 1999 but believed that he was not responsible for the freeze damage to the pipes or commode (transcript selection at pg. 43a-45a).

Although not established directly from testimony, it would have seemed that there must be cause and effect; if heat is not maintained and the furnace is not utilized, then pipes freeze.[5] The toilet, shower, and lavatory were still functional in June of 1998 when Timmons inspected the floor, and John Smith testified at the hearing that he had to wait until Cassell completed his shower before he could inspect the bathroom floor in July of 1998.(transcript selection at pg. 49a-50a).

Cassell further testified that the water in the bathroom had to be shut off in 1999 and he was forced to rent motel rooms in order to bathe and for other hygienic purposes. However, he later admitted, during cross-examination, that he had been going to motels since 1997. This testimony identified a recreational pattern that had continued into 1999 (transcript selection at pg. 43a).

Cassell hypothesized at the hearing that a leaking roof (repaired two years earlier) had caused the bathroom floor to rot which caused the bathtub to sag which caused a water pipe to break which sprayed the floor which caused the floor to rot, etc. etc. .(transcript selection at pg. 43a-45a)

The Heirs contend that Cassell failed to heat the house, the house froze, a water pipe under the bathroom floor then burst, and, after it thawed, began

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[5] It should be noticed, although not in the record, that Timmons had repaired pipes for Cassell several times and refused to do more if Cassell would not maintain fuel for the furnace and keep cellar doors shut.

spraying water on the bathroom floor. This caused the floor to decay and it eventually began to sag in 1998. However, when the Heirs submitted their amended claim, they eliminated that portion which dealt with structural damage. Although this was the most probable explanation for the damaged floor, the Heirs could not establish with certainty when the pipe had frozen and if structural damage could be unequivocally attributed to Cassell. The amended claim was limited to damages for the repairs to the frozen plumbing, the repair of the windowpanes that had been broken, the loss of rents while the repairs were undertaken, cleanup costs, and the delinquent rents

At the hearing, Cassell testified that he mowed the yard and kept the property clean but admitted under cross-examination that there was a problem with trash and the yard was left in a very poor condition.(Transcript at47a) John Smith, Mike Nickel, and John Timmons independently testified that the yard was a mess with trash, old tires, bagged cans, chest high weeds and grass. (transcript selection at pg. 48a-50a).

Analysis of Landlord-tenant rules

The bankruptcy court and the reviewing courts cite Ohio R.C. § 5321.04 (A)(2) and (4) as the controlling law after the bankruptcy court (improperly) determined that the damages were attributable to landlord neglect and failure to maintain. This section of the Ohio Revised Code does require the landlord to maintain and repair ordinary wear and tear (text at 37a). However, the Heirs feel that Cassell "trashed" the house and ceased rental payments with fraudulent intent. The relevant Ohio Revised Code should therefore be found under Ohio R.C. § 5321.05 (6) that requires the tenant to refrain from destroying, either intentionally or negligently, the leased property (text at 37a).

Provisions are made pursuant to Ohio R.C. § 5321.07 (A) and (B) (text beginning at 38a) for notice to the landlord to repair defects pursuant to O.R.C. § 5321.04 and the steps that may be taken if repairs are not timely provided. Provisions found in this section requires the tenant to be current with rents and allows a reasonable time for a landlord's performance. If not corrected, then the tenant may deposit his rent with the applicable clerk of courts and petition for court ordered repairs, petition for release of the rents to be applied for the repairs, or vacate the premises (relinquish possession). The tenant could then defend against a landlord's action for rent with the defense of the doctrine of constructive eviction and breach of the covenant of quiet enjoyment of his leasehold.

However, in a month to month verbal lease, it would seem unnecessary to impose the formalities required by O.R.C. § 5321.07. If the tenant retains possession and pays his rent, theoretically he has entered into a new lease term and has passively accepted terms for the month that would encompass the defect. The tenant could easily reject the new monthly terms of the verbal lease by vacating the leasehold and obtaining housing elsewhere. It would seem, then, that economic factors control the verbal lease.

If the tenant is responsible, exhibits good husbandry over the premises, and is timely with the rent, then a landlord is more than willing to repair or allow the tenant the right to deduct reasonable repairs from his rent. In the obverse, if the tenant fails to mow the grass, fails to clean the house, causes excessive depreciation, and his rental checks are returned for insufficient funds, then the landlord may wish that the current tenant would move. He would then "throw the dice again and try to obtain a more suitable tenant."

Likewise, if the premises are worthy, reasonably priced, and the landlord is cooperative, the tenant will want to remain in a "good light" with the landlord and will pay the rent. Differences are usually amicably and informally worked out between the landlord and tenant, with each wishing to please the other for fear of loss with the uncertainty of another landlord or tenant. Rejection of the verbal lease subjects the tenant to moving costs and discomfort of dislocation while the landlord usually loses one or more months rents and suffers the discomfort of having to interview prospective and unknown tenants.

Examination of Relevant Cases

Nowhere can we find a law that allows the reformation of contracts after the consumption of goods or services. The unexpected discovery of cockroaches, rats, and other vermin in a dwelling at the beginning of the leasehold might render a rental unit unfit for habitation because of violations of municipal health and safety codes. The tenant would need to relinquish possession, however, to claim a constructive eviction so that he might qualify for rent abatement. The tenant may have been misled, defects could have been hidden, or an unforeseen seasonal impediment might occur (recurring flooded basement) for the period that the prospective tenant inspected but could not adequately evaluate his bargain. The rule of *caveat emptor* should prevail unless unavoidable mistake, fraud, or misrepresentations were foisted upon the unwary tenant. See *Reste Realty Corporation v. Cooper*, 53 N.J. 444, 452, 251 A.2d 268, 272 (1969).

However, as presented in *Lemle, Lemle v Breeden*, Supreme Court of Hawaii, 51 Hawaii 426, 462 P.2d 470, 40 A.L.R.3d 637 (1969), equity would require the individual to relinquish possession of the premises if their sensibilities were so shocked when entering a new leasehold. The correct remedy was found in

Lemle wherein the tenants moved into a property but their right to the enjoyment of the premises was interrupted by nocturnal invasion of rats from the surrounding hills. They vacated the premises at the end of three days and, in a subsequent action, argued a constructive eviction and the landlord's breach of an implied warranty of habitability in order to recover their deposits and prepaid rents. The courts returned $1100.00 from the original deposit and advanced rental of $1190.00; apparently $90.00 was allowed the landlord for the three days that the Lemles possessed the premises ($800 per month rental equates to approximately $26.30 per day. The Lemles apparently paid $11.10 more than their daily rate for the three days). In order to have claimed constructive eviction, the Lemleys needed to relinquish possession.

The courts are usually wary if a tenant seeks relief from delinquent rents after he has held possession of the premises for a lengthy period of time. See, *Thompson v. Shoemaker*, North Carolina Court of Appeals, 7N.C. App. 687, 173 S.E.2d 627 (1970). The plaintiff in *Thompson* alleged that even though she was poor and unable to seek other more expensive housing, she was entitled to have a structure that complied with the housing code. She sought the return of her back rental payments plus damages for her personal property as well as compensation for her mental and physical agony perpetrated by the substandard condition of her house and the failure of the landlord to make the necessary repairs.

The courts held on appeal that the claim of constructive eviction and illegality of the lease were not applicable even though the premises were substandard and the landlord had failed to repair. The rents were voluntarily paid for fifty-three weeks and the tenant had failed to abandon the premises which would be necessary in order to argue constructive eviction. The court further quoted from a

case decided in 1859, *Edgerton v. Page*, 20 N.Y. 281, which held that:

> "----it would be grossly unjust to permit a tenant to continue in possession of premises and shield himself from payment of rent by reason of alleged wrongful acts of the landlord."

The courts further stated in *Thompson* that:

> "Under the common law rule in effect in this jurisdiction, a lessor is under no implied covenant to repair the premises, and in the absence of an agreement between the parties to the contrary, is not under a duty to keep the premises under repair, or to repair defects existing at the time the lease is executed."
>
> "The fact that defendant's alleged failure to properly maintain the dwelling is in violation of a municipal ordinance is not helpful to plaintiff because she voluntarily continued to occupy the premises after she learned of the violations. ----."

The *Thompson* decision quotes from another North Carolina case in regard to the covenant made by the landlord to maintain and repair arising at the time the lease was signed, and held that: "[T]he rule as stated in the case of *Jordan v. Miller*, 179 N.C. 73, 75, 101 S.E. 550, 551, as follows:

> "----. A contract to repair does not contemplate as damages for the failure to perform it that any liability for personal injuries shall grow out of the defective condition of the premises; *because the duty of the tenant, if the landlord fails to perform his contract to repair, is to do the work himself*, and recover the cost in an action for that purpose, or upon a counterclaim in an action for rent, or if the premises are made untenable by reason of the breach of contract,

> the tenant may move out and defend in an action for rent as upon an eviction. -------."

Reste Realty Corporation v. Cooper, 53 N.J. 444, 452, 251 A.2d 268, 272 (1969) is another case in which the Doctrine of Constructive Eviction was argued after the tenant Cooper abandoned the leased premises. Even though the tenancy had been for more than one year, the court allowed the defense because the lessor had not disclosed that rainwater would flood the first floor and the landlord had not performed on his promise to remedy after several occasions of flooding

Although the doctrine requires that a tenant exercise his option to relinquish possession immediately or his right to relief under the doctrine may be waived if not timely, the concept of deception or misrepresentations in the formation of the lease were foisted upon the unwary Cooper. It was the duty of Reste Realty to disclose, and remedy, the condition. The doctrine still would not relieve Cooper from his rental liability that would continue until the date of the surrender of possession.

Katz v. Comisar, 28 ONP NS 10, (1930) is another vermin case that trumps the above cited cases. The plaintiff moved into a flat and found bedbugs. These insects could be found in the surrounding apartments and Katz (supposedly) quickly moved out. It was held that:

> "The presence of vermin in a flat at the beginning of the term <u>without the fault of the tenant but owing to conditions existing in other flats in the same building</u>, has been held to be a constructive eviction".

Katz is identical to *Reste* from the standpoint that misrepresentation, unavoidable mistake, or deception may have been present at the formation of the lease. The termination of the lease would be the

date of abandonment where theoretically, as in *Lemle*, a determination of the rent could be prorated; some benefit was received by Katz if only for a short duration.

Ohio R.C. § 5301.11 addresses the situation found when the property is rendered uninhabitable by calamity or fire. This section absolves the tenant from paying further rent when a structure is rendered untenable by calamity if the tenant is not at fault or has not perpetrated the act by his own neglect. The lessee must also, at this time, surrender possession so that he will be granted relief from further rental payments. (Text at 36a).

Gay v. Davey, (Ohio 1890), 47 Ohio St 396, 25 N.E. 425 is a case that was brought to Ohio General Code § 6521, the precursor of Ohio R.C. 5301.11:

> "The Statute, in case the buildings are destroyed, does not clothe the landlord with the power of terminating the lease, and if the tenant alone is to have the option of so doing and may be discharged from the obligation to pay rent, he must give up the possession and control of the premises to him who is entitled to the revision."

Dobson v. Howe, (Ohio 1912), 18 OCC NS 384 is a case that parallels *Gay v. Davey*. A grocery store burned and the landlord was notified that the tenant Howe would immediately vacate and relinquish possession. Landlord Dobson sued for his rent stating that it was the duty of Howe to repair and then offset from the rents or counterclaim in the action for rent. The courts held that: "The lessee of a building which, without fault or neglect on his part, is destroyed or so injured by the elements or other cause -------. The lessee must thereupon surrender possession of the premises so leased."

Peters v. Durroh, 277 N.E.2d 69:

The defendant had allowed water to overflow in the kitchen of an apartment and the floor was ruined. The tenant vacated the property but left his possessions in the premises and retained the keys. The courts held that the tenant was responsible for the repair of the floor because of his negligence and the rent continued until the keys were returned. Possession was not terminated until the personal property was removed and the key returned.

Examination of Cases Cited Below

The Appellate Courts have cited three cases to support the bankruptcy court's denial of rent and repairs to the Timmons Heirs. These are: *Freedline v. Cielensky*, 184 N.E.2d 433,436 (Ohio Ct. App. 1961), *Lawrence v. Triangle Capital Corp.*, 628 N.E.2d74, 75-76 (Ohio Ct. App. 1961), and *Smith v. Wright*, 65 Ohio App.2d 101 (1979),416 N.E. 2d 655, 661. The Timmons Heirs believe that the cases either support their position or they should have been reversed if appealed.

In *Smith*, the action was for eviction of the tenant for failure to pay rent pursuant to Ohio R.C. § 5321.03. The tenant claimed infestations of insects, rodents, etc. as an excuse for nonpayment. When the magistrate determined that the tenant had not complied with O.R.C. § 5321.07 for notice to remedy and deposit of rents with the clerk of court, then no further defense could be entertained and the landlord prevailed. *Smith* reinforced the common law that the covenant to pay rent was separate from the covenant to repair and maintain. This would not have precluded the tenant from pursuing damages with a separate action pursuant to O.R.C. § 5321.12 or as a counterclaim in an action by the landlord to collect the back rent. However, in the separate action for rent, it would seem that the tenant could not claim a constructive eviction because he retained possession as determined in *Thompson*.

In *Lawrence*, the court granted abatement of the first three months rent because of an alleged infestation of cockroaches. The tenant complained to the landlord who then sent exterminators to remedy the situation. When a second complaint was received, the landlord sent the exterminator a second time. However, Lawrence also complained to housing authorities and an inspector for the health department found dead roaches. The inspector issued an order to eliminate the roaches but Lawrence applied to the courts and began depositing rents as provided in O.R.C. § 5321.07. This section of the Code affords the landlord an appropriate time, usually thirty days, to remedy the defect. The landlord responded twice to the complaints and it must be assumed that the remedy or extermination was successful because the text of the decision indicates that the inspector found dead roaches.

The concluding arguments presented in Triangle's brief, are quite appropriate although discounted (ridiculed?) by the court:

> "Although the existence of vermin in an apartment may cause the tenant some trouble in eradicating them, it is not always a matter of sufficient gravity to relieve the tenant of his liability. The evidence does not reflect that Mrs. Lawrence was deprived of the beneficial use of the premises in a substantial manner. At no time did the housing inspector find that the premises were uninhabitable or truly unsafe during the relevant time frame associated with this case."

Tenant complaints to a building or judicial authority for building, housing, safety, or health code violations does partially immunize the tenant from a landlords future actions because she can then claim retaliatory eviction or retaliatory rent increase pursuant to Ohio R.C. § 5321.02 (A); it must be

acknowledged that Lawrence did receive an abatement of $1170.00 which should now be considered as an unjust reward.. It must be assumed that Lawrence had ample time in which she could inspect the premises, before the lease was signed, and had not seen or discovered the cockroaches. The landlord should not be faulted for fraud in the inducement to enter a contract unless the complaining party could prove that the landlord had previously been aware of the problem; this was never argued. As provided in *Lemle*, the proper course was for the complaining party to immediately vacate the property on a claim of constructive eviction. In an action under Ohio R.C. 5321.12, she then could seek the return of her deposit and that part of her advanced rent to which she was entitled for damages to her right to peaceful enjoyment of the premises. The tenant did not relinquish possession and, as in *Thompson*, she could not claim constructive eviction. *Lawrence* should have been reversed on appeal.

In *Freedline*, the court held that a tenant is only obligated to repair or improve premises when there is an agreement to do so, or if the tenant's conduct amounts to waste. He is not obligated to make repair made necessary as a result of ordinary wear and tear. The Freedlines and the Cielenskys were friends who had exchanged services, without expectation of recompense. Freedlines provided their basement rent free for five and one half years and the Cielenskys had used their own funds to install non-removable fixtures and improvements to the basement that they used for an apartment. At the end of five years and seven months, the widowed Mrs. Freedline asked that the Cielenskys begin paying rent. The Cielenskys thereupon filed suit for the improvements they had made in the basement. The second part of the decision stated that, in a tenancy at will, "A tenant is only obliged to repair or improve premises which result from an agreement to do so, or as a result of conduct

that amounts to waste. He is not obligated to make a repair made necessary as the result of ordinary wear and tear." This ruling was patterned after the language found in *Cincinnati Oakland Motor Co. v. Meyer*, (Ct. App. Ohio, Hamilton County, 1930), 174 N.E. 154. This case was for the return of moneys expended by a tenant to install a new furnace, after several years of occupancy, because it would have been the same cost if they had repaired the old furnace.

"(1). In the absence of statute, ordinance, or express stipulation, or covenant, the lessor (landlord) is not bound to make repairs to the leased property."

"(2). In the absence of express stipulation, covenant, statute, or ordinance, the tenant's obligation is not to repair generally, but is in effect an implied agreement against voluntary waste and to return the premises to the landlord in substantially as good condition as received, wear and tear excepted."

Because the Cincinnati Oakland Motor Co. had not presented evidence to prove the depreciable life of the furnace, they could not prove that the defect was caused by ordinary wear and tear and thus had to pay for the new furnace. "The stipulation being wholly silent as to the cause of the defective condition of the plant, the burden being on the tenant to repair and replace, unless excused by a showing that reasonable wear and tear had caused the defects, we are constrained to hold that the installation was for the tenant's benefit and in fulfilling his duty, and must be at his cost."

The operative words applicable to this case are found in the phrases: "or as a result of conduct that amounts to waste." *Freedline*. And further:"the tenant's obligation is not to repair generally, but is in effect an implied agreement against voluntary waste and to return the premises to the landlord in

substantially as good condition as received, wear and tear excepted." *Cincinnati Oakland Motor Co. v. Meyer.*

Conclusions

The bankruptcy court and the reviewing courts have stated that the damage to the premises leased by Cassell, was attributed to landlord neglect and was controlled by Ohio R.C. 5321.04 (A)(2) and (4). This is contrary to the preponderance of the evidence and must shock the sensibilities of any reasonable person and leave that person with the firm impression that error, mistake, and injustice has been committed. The record and proceedings, pertaining to this case, indicates that a travesty has been committed, in the interpretation of the laws and statutes of The United States and of The State of Ohio. A reasonable analysis arrived at by reasonable people would necessitate the conclusion that Timothy Scott Cassell, either negligently, by failing to exercise a required covenant, or intentionally by commission of act, caused the damage to the Timmons Heirs' property. This would not be a violation of the landlord's duties prescribed by Ohio R.C. 5321.04 but must instead be considered a violation of a tenant's duties as prescribed by Ohio R.C. 5321.05. The covenant to cause no harm and to return the property to landlord in essentially the condition that it had been received, absent ordinary wear and tear, has been violated.

The damages to the premises must be assigned to Cassell and and should be viewed as malicious and intentional or wilfully negligent and should not be discharged in bankruptcy pursuant to USC Title 11 §523 (a)(6). Likewise, Cassell's withholding of rent was a wilful and intentional act and, if committed while under the protection of bankruptcy law and the automatic stay must be considered a fraud. Cassell

should not be discharged in bankruptcy pursuant to USC Title 11 § 523 (a)(2)(A) [6]

If the building had been damaged or destroyed by fire, weather, or other circumstance that was not Cassell's fault, then the action would be entertained pursuant to Ohio R.C. 5301.11. However, to obtain relief under that section of the Code, Cassell would have had to relinquish possession. The rents would continue until his personal goods were removed from the premises and the keys were returned to the landlord. This would be consistent with *Peters v. Durroh*. In all circumstances, it seems that in order to escape further liability for rent, Cassell would have had to remove his property and return the keys. Constructive eviction necessitates that possession is returned to the landlord.

The tenant Cassell seems oblivious to the fact that there is cause and effect between his responsibility to maintain heat in the premises and the resulting damage to the premises. Water pipes, commodes, waste-water traps, and the structure of the premises itself were damaged, primarily due to the water released after the house froze, but the contributory agent was Cassell who permitted the house to freeze. When asked by his attorney if he had broken the commode, he nebulously answers no, that he did not break the commode but that there was water in the commode that froze, and that caused the commode to break. He promotes the fanciful analysis that a leak in the roof, two years previously, had in some manner caused the floor to rot. This allowed the

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[6] It should be noted that three months rent or treble damages with reasonable attorney fees, can be levied against a tenant who retains possession and whose holdover is wilful and not in good faith pursuant to § 4.301(c) of the Uniform Residential Landlord and Tenant act. However, no such provision can be found in the 1974 Ohio Residential Landlord and Tenant Act.

floor to fail, the bathtub to sink, and this series of events caused a water pipe underneath the bathroom floor to break. This analysis stretches the bounds of reason and falls into the lap of ridiculous, the arms of ludicrous, and consorts with the daughter of idiocy. An attorney that utilizes every known and reasonable avenue in the promotion or defense of his client should be praised. Likewise, fanaticism in the pursuit of a cause at the expense of reason and common sense is a mark against the integrity of the legal system and should not be tolerated.

The Timmons Heirs are partners by devise with interests in property inherited from their parents. The concept of the Common Law Doctrine of Seizin is as unfamiliar and perplexing to them as is the recent action of a local court (Columbus, Ohio) that held a landlord in contempt for failing to maintain his rental properties. This individual has been sentenced to 180 days in jail (suspended) and has been ordered to occupy one of his housing units until all units are repaired. He has recently been ordered back to court for failing to timely repair pursuant to the courts' finding of contempt. The penalty for this failure to timely repair could possibly be the re-imposition of the 180 day jail sentence. This individual has indicated that he intends to sell his properties because tenant complaints have imposed an enormous financial and emotional burden with attendant unforeseen and unexpected legal demands.

It would appear that the actions of that court may be well intentioned but in fact are misguided (if not unconstitutional) and will have a negative effect upon the housing market. Very few individuals will wish to invest in properties that might subject them to imprisonment. Also, this court's action may in fact be sinister with a de facto "confiscation of private property". Whatever the situation, the complaining tenants will eventually lose because of the resulting

reduction in supply of housing units or the increased cost of housing to offset higher maintenance costs and legal fees.

The Petitioners believe that landlord-tenant law may be viewed as a string. The string follows either an unobstructed and unfettered path, with free market forces pulling the string, or is shoved into a hopeless jumble in which the courts exert increasing pressures from behind to force the string into the "correct" path.

Respectfully Submitted September12, 2001

APPENDICES

No. 00-4523

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: TIMOTHY SCOTT CASSELL, Debtor	)
JOHN C. TIMMONS; PRYOR B. TIMMONS, JR.; ANN T. ROOT, Appellants,	)
v.	)
TIMOTHY SCOTT CASSELL; FRANK PEES, Trustee, Appellees.	)

Filed
June 15, 2001
LEONARD GREEN, Clerk

"NOT RECOMMENDED FOR FULL-TEXT PUBLICATION"
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Before: MARTIN, Chief Judge; NORRIS, Circuit Judge; QUIST, District Judge.[7]

John C. Timmons, Pryor B. Timmons, and Ann T. Root (the "Timmons Heirs"), appeal a judgment of

[7] *The Honorable Gordon J. Quist, United States District Judge for the Western District of Michigan, sitting by designation.

the Bankruptcy Appellate Panel ("BAP") which affirmed two decisions of the bankruptcy court of the Southern District of Ohio. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Because the parties are familiar with the factual and procedural history of this case, we need not recount it here. Suffice it to say that the debtor, Timothy Scott Cassell, lived in a house rented from the Timmons Heirs until shortly before he filed his Chapter 13 petition in the bankruptcy court. The Timmons Heirs filed a claim for rent and damage to that property and the debtor objected to it. The bankruptcy court entered an order allowing the claim in part, but disallowing amounts for rent and water damage. The Timmons Heirs appealed the disallowance of those amounts to the BAP. They also appealed the bankruptcy court's denial of their motion for reconsideration. The BAP affirmed the bankruptcy court's disallowance of the claim amounts for rent and water damage on June 19, 2000. The BAP also affirmed the bankruptcy court's denial of the motion for consideration in that same opinion. No notice of appeal was filed from the BAP's June 19, 2000 decision.

The bankruptcy court also sanctioned the Timmons Heirs under Bankruptcy Rule 9011 for their conduct in connection with the filing of their claim in this case. The Timmons Heirs appealed that decision to the BAP. The BAP concluded that the bankruptcy court abused its discretion in imposing sanctions and reversed the bankruptcy court's decision. The Timmons Heirs filed a notice of appeal to this court on December 6, 2000.

Initially, the debtor contends that the Timmons Heirs' notice of appeal targets only the November 6,

2000 BAP decision, not the June 19, 2000 BAP decision, and that our review should be limited accordingly. *See* Fed. R. App. P. 3(c) (stating that the notice of appeal must designate the challenged order or judgment). The contention is rejected. The Timmons Heirs' notice of appeal, although inartfully drafted, invokes both orders.

Bankruptcy cases differ from most other federal cases in that the court of appeals does not afford first-instance appellate review. Rather, Congress has provided for intermediate review, conferring on district courts and federal bankruptcy appellate panels the authority to hear appeals from bankruptcy court decisions, but preserving to the parties a right of further review in the courts of appeals. *See* 28 U.S.C. § 158. Whether such an appeal comes to this court by way of the district court or the BAP, the standard of review is the same: this court focuses on the bankruptcy court's decision, scrutinize that court's findings of fact for clear error, and afford de novo review to its conclusions of law. *See Rembert v. AT&T Universal Card Servs., Inc. (In reRembert)*, 141 F.3d 277, 280 (6th Cir.), *cert. denied*, 525 U.S. 978 (1998); *Nicholson v. Isaacman (In re Isaacman)*, 26 F.3d 629, 631 (6th Cir. 1994). Findings of fact are reviewed under the clearly erroneous standard. *See* Fed. R. Bankr. P. 8013. A finding of fact is clearly erroneous "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Tedeschi v. Falvo (In re Falvo)*, 227 B.R. 662, 663 (B.A.P. 6th Cir. 1998) (citations omitted). Conclusions of law are reviewed de novo. "De novo review requires the Panel to review questions of law independent of the bankruptcy court's determination." *First Union Mortgage Corp. v. Eubanks (In re Eubanks)*, 219 B.R. 468, 469 (B.A.P. 6th Cir. 1998).

Upon review, we conclude that sufficient evidence in the record supports the bankruptcy court's order disallowing the Timmons Heirs' claim. The home in question was in an unfit condition and the water damage resulted from the age of the home and landlord neglect. Further, Ohio landlord and tenant law supports the bankruptcy court's conclusion that the debtor was not liable for rent or for damage to the property based on its unfit condition. *See* Ohio Rev. Code § 5321 .04(A)(2) and (4) (Banks-Baldwin 2000); *See Lawrence v. Triangle Capital Corp.*, 628 N.E.2d 74, 75-76 (Ohio Ct. App. 1993); *Smith v. Wright*, 416 N.E.2d 655, 661 (Ohio Ct. App. 1979); *Freedline v. Cielensky*, 184 N.E.2d 433, 436 (Ohio Ct. App. 1961).

Accordingly, the orders of the BAP, dated June 19, 2000 and November 6, 2000, are affirmed. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

/S/ Leonard Green
Clerk

ELECTRONIC CITATION: 2000 FED App. 0011p
(6th Cir.) File Name: 00b0011p.06

BANKRUPTCY APPELLATE PANEL
OF THE SIXTH CIRCUIT

In re: Timothy Scott Cassell, Debtor	)
	)
JOHN C. TIMMONS, ET.AL., Appellants	)
	)
v.	)
	)
TIMOTHY SCOTT CASSELL, Appellee	)

No. 00-8037

Appeal from the United States Bankruptcy Court for the Southern District of Ohio, Eastern Division, at Columbus.

No. 99-52491

Submitted on Briefs: October 4, 2000
Decided and Filed: November 6, 2000

Before: MORGENSTERN-CLARREN, RHODES, and STOSBERG, Bankruptcy Appellate Panel Judges.

COUNSEL

ON BRIEF: David G. Korn, Columbus, Ohio, for Apellee. Ann T. Root, Columbus, Ohio, pro se, Pryor B. Timmons, Jr., Hilliard, Ohio, pro se, John C. Timmons, Lockbourne, Ohio, pro Se.

OPINION

PAT E. MORGENSTERN-CLARREN, Bankruptcy Appellate Panel Judge. The bankruptcy court sanctioned John Timmons, Ann Root, and Pryor Timmons (the "Timmons Heirs" or the "Heirs")[8] under Bankruptcy Rule 9011 for their conduct in connection with the filing of a claim in this Chapter 13 case. The Timmons Heirs appeal that decision. The Panel has determined after examining the briefs, appendix, and record that oral argument is not needed. FED. R. BANKR. P.8012. For the reasons stated below, the Panel concludes that the bankruptcy court abused its discretion in imposing sanctions, and so we REVERSE.

I. JURISDICTION AND STANDARD OF REVIEW

The Bankruptcy Appellate Panel of the Sixth Circuit has jurisdiction over this appeal from a final order of the United States Bankruptcy Court for the Southern District of Ohio. 28 U.S.C. §~ 158(a)(1) and (c). Decisions regarding the imposition of sanctions under Bankruptcy Rule 9011 are reviewed for an abuse of discretion. *Corzin v. Fordu (In re Fordu)*, 201 F.3d 693 (6th Cir. 1999). A bankruptcy court "abuses its discretion if it bases its conclusion on an erroneous version of the law or on a clearly erroneous assessment of the evidence." *Silverman v. Mutual Trust Life Ins. Co. (In re Big Rapids Mall Assocs.)*, 98 F 3d 926, 930 (6th. Cir.1999). The overall question is whether the reviewing court has a definite and firm conviction that the trial court committed a clear error

[8]The Timmons Heirs are heirs (through their parents' pending probate estates) to rental property which was leased by the Debtor.

of judgment, using the reasonable person standard. *Barlow v. M.J. Waterman & Assocs., Inc. (In re M.J. Waterman & Assocs., Inc.)*, 227 F.3d 604 (6th Cir. 2000).

II. ISSUE ON APPEAL

The issue is whether the bankruptcy court's decision to sanction the Heirs under Bankruptcy Rule 9011 was an abuse of its discretion.

III. FACTS

Prepetition. the Debtor rented a house from the Timmons Heirs under an oral lease. John Timmons was primarily responsible for the rental relationship with the Debtor. The Debtor filed his Chapter 13 case on March 22, 1999 and the court set a bar date for filing proofs of claim. The Timmons Heirs regained possession of the house at some point between the case filing date and the bar date.

John Timmons, on behalf of the Heirs, signed and filed a timely proof of claim. The claim totaled $7,750 and set forth specific amounts for rent (calculated at $300 a month for 11.5 months), property damage allegedly caused by the Debtor, loss of rental income, and property clean-up ($200), without attaching any supporting documents. The Heirs had not yet begun to repair the house at the time the original claim was filed. The Debtor objected to the claim as filed, but "recommended" that it be allowed in the amount of $896 ($600 for two months rent, $96 for window damage, and $200 for property clean-up). The Debtor did not dispute that he had stopped paying rent prepetition. He asserted, however, that the additional amounts for rent and property damage should be disallowed because the house was uninhabitable and any damage resulted from landlord neglect.

Later, after the property repairs were underway,

all three Heirs signed and filed an amended claim in the amount of $6,173.45.[9] They attached receipts for some of the repair expenses and identified other claim amounts as estimated because the repair work was in process. The Heirs also stated that they were doing other work to improve the house and that these repairs were not chargeable to the Debtor. They reduced the amount attributable to property damage, which explains the lower claim amount.

The bankruptcy court held an evidentiary hearing on the objection to claim, at which time the Heirs argued that the Debtor caused the property damage when he allowed the pipes to freeze and the Debtor argued that the damage resulted from the Heirs' failure to maintain the property. The court partially allowed the claim in the amount of $459 ($259 for window damage and $200 for clean-up). All other amounts were disallowed because the court found that the Heirs did not prove their claim and that the Debtor did not have to pay any rent because of the property's poor condition, which the court attributed to the Heirs.[10]

The bankruptcy court then issued a show cause order that required the Timmons Heirs to:

> show cause why they should not be sanctioned for failure to have evidentiary support for all of their factual contentions contained in their Proof of Claim and to

---

[9] The document is titled "Claimants[']] Receipts for Repairs." The three Heirs signed this in compliance with the court's ruling that John Timmons, a non-lawyer, could only represent himself. They all acted pro se throughout these proceedings.

[10]This Panel affirmed the claim decision in *Timmons v. Cassell (In re. Cassell)*, Nos. 00-8009 and 00-8010 (B.A.P. 6th Cir. June 19, 2000) on the grounds that the factual findings were not clearly erroneous and Ohio Landlord-tenet law supported the legal conclusion that no rent was due because of the property's condition.

> establish that their claim was not filed to harass, cause unnecessary delay or needless increase in litigation costs as contemplated by FRBP 9011(b).

In re Cassell, No. 99-52491, Order to Show Cause for Imposition of Sanctions at 1-2 (Bankr. S.D. Ohio Dec. 1, 1999). The court held a hearing on this order and issued a written opinion. After reviewing its original decision concerning the claim and the law surrounding Bankruptcy Rule 9011, the court concluded that sanctions should be imposed because:

> a reasonable inquiry was not made prior to the filing of the claim, and that indeed Mrs. Root and Mr. Pryor Timmons did not have any independent knowledge of the contents of their own claim. A reasonable inquiry would have dictated some explanation for the contractual basis for the claimed rental arrearage and the provision of invoices and/or receipts to evidence claimed damages and cleaning expenses. Finally, a reasonable inquiry on the part of the Timmons Heirs should have included some knowledge and recognition of the extremely poor condition of the home due to its age and significant structural problems. The Timmons Heirs simply filed a claim, and what ensued was the previously detailed flurry of litigation. The scope and intensity of litigation could have been reduced had the Timmons Heirs gathered and filed with their claim supporting data and scrutinized the condition of the home to determine what damages could fairly be attributed to the Debtor.

In re Cassell, No. 99-52491, Order Imposing Sanctions at 6-7 (Bankr. S.D. Ohio Mar. 6, 2000). The court sanctioned the Heirs by awarding the Debtor attorney

fees and his lost wages for attending hearings and striking the previously-allowed claim. The Heirs argue that the court made a clearly erroneous assessment of the evidence and abused its discretion in imposing sanctions. The Debtor contends that the decision was within the bankruptcy court's discretion.

IV. DISCUSSION

Federal Rule of Bankruptcy Procedure 9011

The bankruptcy court relied on these provisions of Bankruptcy Rule 9011:

> (b) Representations to the Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an . unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, —
>
> > (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; [and]
> >
> > * * *
> >
> > (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery[.]

FED. R. BANKR. P. 9011(b)(1) and (3). Proofs of claim must meet the standards of this Rule. *See Knox v.*

Sunstar Acceptance Corp. (In re Knox), 237 B.R. 687, 697 (Bankr. N.D. Ill. 1999).

The Sixth Circuit has held that: the test for imposing Rule 9011 sanctions is whether the individual's conduct was reasonable under the circumstances. In applying this test, the bankruptcy court "is not to use the benefit of hindsight but 'should test the signer's conduct by inquiring what was reasonable to believe at the time the [claim] . . . was submitted."

Mapother & Mapother, P.S. C. v. Cooper (In re Downs), 103 F.3d 472, 481 (6th Cir. 1996) (quoting *McGhee v. Sanilac County*, 934 F.2d 89, 93 (6th Cir. 1991) (internal citation omitted)). Factors to consider in making this determination include the amount of time available for investigation, the nature of the investigation, and whether the claim is based on a plausible view of the law. *Davis v. Crush*, 862 F.2d 84, 88 (6th Cir. 1988).

Rule 9011 also imposes a continuing responsibility to review and reevaluate pleadings and modify them when It is appropriate. *Runfola & Assocs., Inc. v. Spectrum Reporting II, Inc.*, 88 F.3d 368, 374 (6th Cir. 1996) ("In *Herron v. Jupiter Transp. Co.*, 858 F.2d 332, 335 (6th Cir. 1988), this court stated that 'the reasonable inquiry under Rule 11 is not a one-time obligation.' '[T]he plaintiff is impressed with a continuing responsibility to review and reevaluate his pleadings and where appropriate modify them to conform to Rule 11.' *Id.* at 335-36.").

The Bankruptcy Court Decision

The bankruptcy court found that the Timmons Heirs filed their claim without making the reasonable inquiry required by Rule 9011 and that by doing so they unnecessarily increased the costs of litigation for the purpose of obtaining higher payment. The Panel concludes that this decision was an abuse of

discretion because it is based on a clearly erroneous assessment of the evidence.

In concluding that the Heirs did not make a reasonable inquiry, the court found that if they had investigated they would have been able to explain the contractual basis for the rent claim. The record clearly shows, however, that the Heirs did explain the contractual basis, which was that they had an oral contract at $300 a month rent and the Debtor had stopped paying rent. There was no written documentation that could have been attached to the claim because the agreement was oral. The Debtor did not dispute these positions and they were factually well-grounded when the claim was filed.

With respect to the $200 claim for clean-up costs, the court cited the Heirs' failure to provide invoices or other documents. The Debtor, however, acknowledged in his objection that he owed the $200. No documentation or other proof was needed.

The court also faulted the Heirs for not documenting their property damage claim when the claim was filed. The court did not consider, however, that they could not have attached repair invoices or receipts to the original claim because they had not yet begun to repair the property. The court also did not consider that after the repairs were underway, the Heirs amended the claim to provide some receipts and to explain why other items were estimated. They also acknowledged at that time that certain repair work was not attributable to the Debtor. The Heirs stated at the show cause hearing that they did not have additional invoices or receipts because the repairs were being done by a person who was living rent-free on the property in exchange for the repair work. These uncontested statements explain the reasonable basis for the Heirs' factual position and the court did not find them to lack credibility. Viewing the issue as of the time that the claim was submitted and amended,

the record clearly shows that the Heirs made a reasonable inquiry under the circumstances and had evidentiary support for their position.

The court also held that a reasonable pre-filing inquiry would have included recognition by the Timmons Heirs that the house was in poor condition due to age and structural problems, rather than to the Debtor's actions. Again, the reasonableness of the Heirs' conduct must be examined without the benefit of hindsight. The parties agreed from the outset that there were major problems with the house, although they disagreed as to who was responsible for its condition. The Heirs contended that the Debtor caused the problems by failing to maintain the heat and the Debtor claimed that the problems resulted when the Heirs failed to make necessary repairs. As noted above, the Debtor himself admitted from the outset that he owed some amounts for property damage and clean-up. And the Heirs did reduce their damage claim as they began to do the repairs. They also recognized in the amended filing that they needed to do some improvements at their own expense. The facts clearly show that the Heirs did consider what damages were attributable to the Debtor, and that they did have a factual basis for their position, even though the court did not ultimately agree with their assessment when it concluded that the Debtor was responsible for only a small part of the damage.

Finally, the bankruptcy court found that two of the Timmons Heirs did not make a reasonable inquiry because they did not have independent knowledge about their claim. These two Heirs correctly point out that they did not sign or advocate the original claim; they only signed the amendment. The court did not consider that, in pursuing the amended claim, these two Heirs relied on the personal knowledge of the third claimant (their brother) who was primarily responsible for the rental relationship with the Debtor. The court

did not make any findings as to why that reliance was not reasonable under the circumstances or why it established sanctionable conduct.

The Heirs were, no doubt, doggedly persistent in the belief that their claim should be allowed for a greater amount than the court ultimately awarded. The Panel has a definite and firm conviction, however, that the finding that the Heirs did not make a reasonable inquiry under the circumstances and did not have evidentiary support for their position is a clearly erroneous assessment of the evidence. As a result, the bankruptcy court abused its discretion in imposing Rule 9011 sanctions.

V. CONCLUSION

The bankruptcy court's decision to impose sanctions under Bankruptcy Rule 9011 is REVERSED. Having concluded that no basis exists to award sanctions, the Panel will not address the remaining issues raised by the Timmons Heirs.

BANKRUPTCY APPELLATE PANEL

OF THE SIXTH CIRCUIT

In re: Timothy Scott Cassell, Debtor	)
JOHN C. TIMMONS, ET.AL., Appellants	)
v.	)
TIMOTHY SCOTT CASSELL, Appellee	)

Nos. 00-8009 and 00-8010
Filed July 25, 2000

Appeal from the United States Bankruptcy Court for the Southern District of Ohio, Eastern Division, at Columbus.

No. 99-52491

Before: MORGENSTERN-CLARREN, RHODES, and STOSBERG, Bankruptcy Appellate Panel Judges.

Upon consideration of the petition for rehearing filed by the appellants, the Panel finds that the petition is untimely under FEDERAL RULE OF BANKRUPTCY PROCEDURE 8015 and, additionally, that when considered on the merits it does not state good cause. It is, therefore, ORDERED that the petition for rehearing is DENIED.

ENTERED BY ORDER OF THE PANEL

/S/ Leonard Green
Leonard Green, Clerk

BANKRUPTCY APPELLATE PANEL
OF THE SIXTH CIRCUIT

Nos. 00-8009/8010
Filed June 19, 2000
Leonard Green, Clerk

In re: Timothy Scott Cassell, Debtor

JOHN C. TIMMONS, et al.,
Appellants

v.

TIMOTHY SCOTT CASSELL,
Appellee

Before: MORGENSTERN-CLARREN, RHODES, and STOSBERG, Judges of the Bankruptcy Appellate Panel

JUDGMENT

On Appeal from the United States Bankruptcy Court for the Southern District of Ohio at Columbus

FILED: June 19, 2000

This cause having been submitted upon the record of lower court proceedings and the briefs of the parties, it is the judgment of the Bankruptcy Appellate Panel that the decision of the Bankruptcy Court disallowing the claim amounts for rent and water damage is AFFIRMED as set forth in the opinion filed contemporaneously with this judgment. IT IS FURTHER ORDERED that the Bankruptcy Court's denial of the motion for reconsideration is also AFFIRMED.

FOR THE PANEL

/s/ Leonard Green
Leonard Green, Clerk

"By order of the Bankruptcy Appellate Panel of the Sixth Circuit, the precedential effect of this decision is limited to the case and parties pursuant to 6th Cir. BAP LBR 8010-1(c)."

BANKRUPTCY APPELLATE PANEL
OF THE SIXTH CIRCUIT

In re: Timothy Scott Cassell, Debtor	)
JOHN C. TIMMONS, ET.AL., Appellants	)
v.	)
TIMOTHY SCOTT CASSELL, Appellee	)

Nos. 00-8009 and 00-8010
Appeal from the United States Bankruptcy Court for the Southern District of Ohio, Eastern Division, at Columbus.
No. 99-52491

Submitted: May 30, 2000
Decided and Filed: June 19, 2000

Before: MORGENSTERN-CLARREN, RHODES, and STOSBERG,
Bankruptcy Appellate Panel Judges.

COUNSEL

ON BRIEF: David G. Korn, Columbus, Ohio, for Appellee. John C. Timmons, Lockbourne, Ohio, Pryor B. Timmons, Jr., Hilliard, Ohio, Ann T. Root, Columbus, Ohio, pro Se.

OPINION

PAT E. MORGENSTERN-CLARREN, Bankruptcy Judge. The Debtor Timothy Cassell lived in a house rented from John Timmons, Ann Root, and Pryor Timmons (the "Timmons Heirs"[11] until shortly before he filed his Chapter 13 case. The Timmons Heirs filed a claim for rent and damage to that property and the Debtor objected to it. The bankruptcy court entered an order allowing the claim in part, but disallowing amounts for rent and water damage. The Timmons Heirs appeal the disallowance of those amounts. They also appeal the bankruptcy court's denial of their motion for reconsideration. The Panel has unanimously determined after examining the briefs, appendix, and record that oral argument is not needed. FED. R. BANKR. P. 8012. For the reasons stated below, we AFFIRM.

I. ISSUES ON APPEAL

This appeal raises two issues. The first is whether the bankruptcy court's findings of fact are clearly erroneous. The second is whether the bankruptcy court abused its discretion in denying the motion for reconsideration.

II. JURISDICTION AND STANDARD OF REVIEW

The Bankruptcy Appellate Panel of the Sixth Circuit has jurisdiction over this appeal. The United States District Court for the Southern District of Ohio has authorized appeals to the BAP of final orders of bankruptcy courts under 28 U.S.C. § 158(a)(1). The bankruptcy court's findings of fact are reviewed under the clearly erroneous standard. *Providian Bancorp v.*

[11] The Timmons Heirs are heirs to the rental property through their parents' pending probate estates.

Shartz (in re Shartz), 221 B.R. 397 (B.A.P. 6th Cir. 1998). A finding of fact is clearly erroneous "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511 (1985) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525 (1948)).

The denial of a motion to reconsider a claim is reviewed for an abuse of discretion. *Halverson v. Estate of Earl R. Cameron (In re Mathiason)*, 16 F.3d 234 (8th Cir. 1994). "A court has abused its discretion if the reviewing court has a definite and firm conviction that the trial court committed a clear error in judgment in the conclusion that it reached based on all the appropriate factors." *Belfance v. Black River Petroleum, Inc. (In re Hess)*, 209 B.R. 79, 80 (B.A.P. 6th Cir. 1997).

III. FACTS

The Debtor rented a house from the Timmons Heirs for several years under an oral lease agreement. The parties did not have an agreement, oral or written, that the Debtor would repair or maintain the property. The Debtor moved out of the house in January 1999 and filed this Chapter 13 case on March 22, 1999. The Timmons Heirs filed a timely claim in the amount of $7,750 for rent, property damage (including broken windows and water damage), and clean up and disposal of trash. The Debtor objected to the rent claim, in part on the ground that the property was uninhabitable during the period for which rent was sought. He objected to the water damage claim because this damage resulted from landlord default and waste of the premises.

The bankruptcy court held an evidentiary hearing. At that hearing, the Debtor testified that the

home was a rundown, hundred year old farmhouse, with a multitude of problems both inside and out. He testified that falling bricks from the chimney made it hazardous to be outside. The interior problems centered on the kitchen and bathroom. The kitchen water pipes froze annually due to lack of insulation and insufficient heat. In 1997, water leaked from the roof into the bathroom, which caused the ceiling to decay and crumble. Water would then pour through the ceiling in a rainstorm. While the roof was eventually repaired, the damage to the ceiling and bathroom floor was not. The floor later caved in and the bathtub sank. Once or twice a year, the bathroom became infested with flying insects. As a result of a continuing water leak in the bathroom, the Debtor resorted to staying at motels so that he could shower before going to work. The Debtor stated that water to the bathroom eventually had to be shut off to stop the damage and that the home was not habitable from June of 1998 forward.

John Smith, a witness called by the Timmons Heirs, substantiated the unusable condition of the bathroom. He testified that John Timmons wanted to hire him to repair the bathroom floor in 1998, but he refused to take the job because the water damage had caused such unsanitary conditions. John Timmons also testified, stating that the problems were attributable for the most part to the Debtor's actions.

At the close of the evidence, the bankruptcy court rendered an oral opinion. The court allowed the claim in the total amount of $459 ($259 for window repairs and $200 for clean up and trash disposal) based on the Debtor's acknowledgment at trial that he was liable for those amounts. The court disallowed the rent and water damage claims, finding that: (1) the parties did not have a lease agreement that addressed rent and repair and maintenance obligations; (2) the Debtor was not responsible for the water damage

because the poor condition of the property resulted from its age and landlord neglect; and (3) the Timmons Heirs failed to prove they were entitled to rent and damages.

The Timmons Heirs moved to reconsider the disallowance decision on the ground that the bankruptcy court had misinterpreted the evidence presented and should consider additional evidence. The court denied the motion because it concluded there was no legal or factual basis for reconsideration.

IV. DISCUSSION

The Claim Order

The Timmons Heirs challenge the bankruptcy court's finding that the home was in an unfit condition and that the water damage resulted from the age of the home and landlord neglect. In making these factual findings, the court credited the Debtor's testimony over that offered by the Timmons Heirs. When considering whether findings of fact should be set aside, "due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses." FED. R. BANKR. P. 8013. Upon review, the Panel concludes that the factual findings are amply supported by the record and are not clearly erroneous.

Ohio landlord and tenant law supports the bankruptcy court's conclusion that the Debtor was not liable for rent or for damage to the property based on its unfit condition. Under Ohio law, a tenant is not responsible for repairs unless the repairs are required as a result of his waste, or by agreement. *See Freedline v. Cielensky*, 184 N.E.2d 433 (Ohio Ct. App. 1961). The parties here did not have an agreement that the Debtor would be responsible for repairs. And, because the court concluded that the Debtor did not cause the water damage, he was not otherwise liable for the repairs.

In contrast, Ohio Revised Code § 5321.04 requires a landlord to maintain plumbing and keep rental property in a fit and habitable condition:

> (A) A landlord who is a party to a rental agreement shall do all of the following:
>
> * * *
>
> (2) Make all repairs and do whatever is reasonably necessary to put and keep the premises in a fit and habitable condition;
>
> * * *
>
> (4) Maintain in good and safe working order and condition all electrical, plumbing, sanitary, heating, ventilating, and air conditioning fixtures and appliances, and elevators, supplied or required to be supplied by him[.]

OHIO REV. CODE §~ 5321 .04(A)(2) and (4) (Banks-Baldwin 2000). These duties apply to both oral and written lease agreements. OHIO REV. CODE § 5321.01(D) (Banks-Baldwin 2000). A landlord's failure to comply with these statutory requirements may reduce the amount of rent that would otherwise be owed. See *Smith v. Wright*, 416 N.E.2d 655, 661 (Ohio Ct. App. 1979). A tenant is entitled to a reasonable rent abatement based on conditions which render the premises uninhabitable. *Lawrence v. Triangle Capital Corp.*, 628 N.E.2d 74 (Ohio Ct. App. 1993). The bankruptcy court, therefore, correctly concluded that the landlord's failure to keep this property in a fit and habitable condition and failure to maintain the plumbing was a defense to the Debtor's payment of rent.

The Reconsideration Order

The Timmons Heirs also argue that the bankruptcy court abused its discretion when it denied

their motion for reconsideration and failed to consider additional information regarding the rent and water damage issues. Bankruptcy Code § 502(j) provides in pertinent part that "[a] claim that has been allowed or disallowed may be reconsidered for cause. A reconsidered claim may be allowed or disallowed according to the equities of the case." 11 U.S.C. § 502(j). The bankruptcy court's factual determinations are not clearly erroneous and its legal conclusion that rent and damages were not owed by the Debtor is sound based on Ohio law. Under these circumstances, the court did not abuse its discretion in denying the motion to reconsider.

CONCLUSION

The bankruptcy court's disallowance of the claim amounts for rent and water damage is AFFIRMED. The bankruptcy court's denial of the motion for reconsideration is also AFFIRMED.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	Chapter 13
	Case No. 99-52491
TIMOTHY SCOTT CASSELL	SSN: 585-94-7987
Debtor	Judge Caldwell

FILED
00 May 30 AM 7:52
Michael D. Webb, CLERK
U.S. Bankruptcy Court
Columbus, Ohio

Entered 5/30/00

ORDER GRANTING DEBTOR'S REQUEST FOR IMPOSITION OF MONETARY SANCTIONS AND DIRECTIVES OF A NONMONETARY NATURE

This matter came on for consideration by the Court upon the Debtor's Request for the Imposition of Monetary Sanctions and Directives of a Nonmonetary Nature, filed March 23, 2000, (hereinafter "the Sanctions Request"), together with Debtor's Memorandum in Support, and the Affidavit and time record of Debtor's case attorney. The Sanctions Request asks that this Court award monetary sanctions and impose directives of a nonmonetary nature in favor of Debtor and against interested parties John Caldwell Timmons, Ann Root, and Pryor B. Timmons, Jr., jointly and severally, and also against these persons in their organizational capacity, as the Timmons Heirs (hereinafter collectively "the Respondents"). The Court having reviewed the same, and being filly advised in the premises hereof, hereby makes the following findings and conclusions:

The Court hereby finds that the Sanctions

Request was served and filed pursuant to Rule 9011of the Federal Rules of Bankruptcy Procedure and Local Bankruptcy Rule 9011-3, and that none of the Respondents have filed memoranda opposing the relief sought by Debtor, nor have they requested a hearing. The Court finds that prior to Debtor's filing the Sanctions Request, the Court made a certain Order Imposing Sanctions Pursuant to FRBP 9011(c)(1)(B), which was entered on March 6, 2000, and which set forth that the Court had . . . "determined that the imposition of sanctions is appropriate pursuant to Federal Rules of Bankruptcy Procedure 9011. . . .", and that ". . . the Timmons Heirs should be sanctioned, jointly and severally. . . ." In so doing, the Court recognizes that FRBP 9011 (c)(2) provides for imposition of both monetary and nonmonetary sanctions, and that without limiting the Court in determination of the nature and extent of the sanctions appropriate for any given situation, LBR 9011-3 enumerates specific sanctions that may be applied. The Sanctions Request asks that the Court sanction the Respondents by striking and totally disallowing that portion of the Timmons Heirs proof of claim that was previously allowed in the amount of $459. 00, and also by adjudging them jointly and severally liable for damages to Debtor in the amount of $478.23, and to Debtor's case attorney in the amount of $4,097.25.

For good cause shown the Court hereby Orders that the Sanctions Request shall be and hereby is granted. It is hereby Ordered that the Timmons Heirs Proof of Claim, previously allowed in the amount of $459.00 and disallowed for all amounts in excess of $459.00, shall be totally disallowed, and that the Chapter 13 Trustee shall administer said claim in accordance with this Order. It is further Ordered that John Caldwell Timmons, Ann Root, and Pryor B. Timmons, Jr., jointly and severally, both individually and also collectively in their capacity as the Timmons

Heirs, shall pay the sum of $478.23 to Debtor Timothy Scott Cassell, and shall pay the sum of $4,097.25 to Debtor's case attorney, David G. Korn, and that judgment for such amounts is hereby Ordered. These money judgments are based upon the Debtor's and Debtor's case attorney's representations regarding costs and expenditures for the period of July 26, 1999 through March 22, 2000, and Debtor and his counsel may file further requests for imposition of monetary sanctions as other and further costs and expenditures are incurred. It is further Ordered that the monetary sanctions shall be paid forthwith, or as Debtor and Debtor's case attorney may agree with the Respondents. In the event of Respondent's failure to comply with the terms of this Order, Debtor and/or Debtor's case attorney may move for other and further relief for contempt of this Court Order.

IT IS SO ORDERED.

Date: May 26, 2000
(Entered 5/30/00)

Charles M. Caldwell
U.S. BANKRUPTCY JUDGE

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re Timothy Scott Cassell, Debtor	Case No. 99-52491 SSN: 585-94-7987 Chapter 13 (Judge Caldwell)

ORDER IMPOSING SANCTIONS PURSUANT TO FRBP 9011(c)(1)(B)

FILED, Clerk, March 3, 2000 @ 8:00 AM
Entered 3/6/00

On January 6, 2000, the Court conducted a hearing on its December 1, 1999, Order to Show Cause for Imposition of Sanctions Pursuant to FRBP 9011(c)(1)(B) and the November 17, 1999, Debtor's Motion to Strike and Motion for Sanctions Against Party in Interest for Failure to Provide Discovery ("Sanctions Motion"). Based upon the statements of the parties and counsel at that hearing, and based upon a review of the record in this case, the Court has determined that the imposition of sanctions is appropriate pursuant to Federal Rule of Bankruptcy Procedure 9011.[12] A brief summary of the history of this case will illustrate the bases for this Court's decision.

For a number of years the Debtor, Timothy Scott Cassell ("Debtor"), pursuant to an oral

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[12] The Court has based its ruling solely on the Order to Show Cause and FRBP 9011 because they directly relate to the proof of claim that served as the catalyst for all the subsequent litigation. For this reason and the fact that a decision has been previously rendered on the merits of the claims dispute, the Debtor's November 17, 1999, Sanctions Motion and the related Claimants' November 10, 1999, Motion for Reconsideration are rendered moot.

agreement, rented a home owned by the Timmons Heirs, consisting of three siblings, John Caldwell Timmons ("Mr. John Timmons"), Ann Timmons Root ("Mrs. Root"), and Pryor B. Timmons, Jr. ("Mr. Pryor Timmons"). On March 22, 1999, the Debtor commenced his second chapter 13 bankruptcy, and scheduled a contingent, unliquidated and disputed debt for unpaid rent on the home in the amount of $1,995.00. On May 13, 1999, Mr. John Timmons filed a pleading captioned as "Creditor's Objection to Debtor's Plan of Reorganization and Motion for Relief from Automatic Stay," and asserted the Debtor could afford to pay all his debts and sought recovery for rent and other damages, "as yet undetermined." On May 17, 1999, Debtor's Motion to Strike Creditor's Objection and Motion for Relief From Stay and Debtor's Motion for Sanctions was filed. This Motion was based upon the fact the Objection was untimely, and it included a request for modification of the stay that must be sought by separate motion, pursuant to local rules. At the May 17, 1999, confirmation hearing, the Court struck the Objection and confirmed the Debtor's plan that provides for a fifty percent (50%) dividend to unsecured creditors. No sanctions, however, were awarded at that time.

Subsequently, on July 20, 1999, Mr. John Timmons filed a proof of claim on behalf of the Timmons Heirs. In this claim, the sum of $7,750.00 was sought as follows:

> Rental: 1/2 of June 1998-May 1999 = 11.5 months @ $300.00/month = $3450
>
> Damages: Broken windows, Frozen pipes, Bathroom floor = $350
>
> Loss of rental income for repairs: 2 months @ $300.00/month = $ 600
>
> Clean up and disposal of trash, old refrigerators, and stoves = $ 200

The proof of claim was not supported by any contracts, receipts and/or invoices.[13] On July 30, 1999, Debtor's Objection to Claim of Timmons Heirs was filed. In this Objection, the Debtor recommended the claim be allowed only in the amount of $896.00 based upon broken windows, clean up costs and two months rent the Debtor conceded was owed. The Debtor asserted that all other charges emanated from the poor condition of the home due to the Timmons Heirs' failure to make needed improvements.

What followed was a highly unusual number of pleadings and orders for a claims dispute in a consumer chapter 13 proceeding. They all became part of the record in order to simply reach some judicial resolution on the dispute between the parties. For ease of reference a summary of a portion of the pleadings and orders follows:

Filing/Entry Date	Pleading/Order	Relief Requested	Disposition

August 7, 1999. Statement of Opposition and Request for Hearing. Mr. John Timmons on behalf of himself and the Timmons Heirs opposes proposed treatment offered by the Debtor and requests a hearing. Hearing commenced on October 5, 1999, and continued to November 2, 1999, for a status conference and concluded on the merits on November 23, 1999.

October 8, 1999. Order Disqualifying John Caldwell Timmons from representing parties. Based upon the oral motion of Debtor's Counsel at the October 5, 1999, hearing. The order precluded Mr. John Timmons, as a non-lawyer, from representing the interests of Mrs. Root and Mr. Pryor Timmons.

October 8, 1999. Order Requiring Filing of Discovery Motions. During the October 5, 1999, hearing it became clear that the Debtor would require discovery to ascertain the bas[e]s for the claim. The order required the Debtor to

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[13] It should be noted that Official Form 10 (Proof of Claim) prescribed by the Judicial Conference of the United States contemplates, through its structure and instructions, the attachment of supporting documents.

file appropriate discovery motions by October 12, 1999. The Order further provided that upon completion of discovery a hearing on the claims dispute would be set.

October 12, 1999. Debtor's Motion to Compel. The Motion asserts that informal attempts to obtain discovery from July – September, 1999, failed, and seeks entry of an order requiring answers to interrogatories and production of documents relevant to the claims dispute. Order granting Debtor's Motion to Compel Discovery entered on November 5, 1999.

November 2, 1999. Claimant's Abbreviated Response to Debtor's Demand for Discovery. Only a portion of the information sought was provided.

November 5, 1999. Order granting Debtor's Motion to Compel Discovery. The Order was entered that required responses to the interrogatories and the provision of requested documents.

November 5, 1999. Order Establishing Hearing Procedures.

Order scheduling a hearing on the Merits.

November 10, 1999. Claimants' Motion for Reconsideration. The Claimants request reconsideration of the November 5, 1999, Order regarding discovery on the basis that too much discovery is being sought. Ruling deferred to reach merits of claim.

November 17, 1999. Debtor's Sanctions Motion. The Debtor requested that all pleadings filed by the Claimants be stricken and sanctions imposed for failure to provide ordered discovery. Ruling deferred to reach merits of claim.

November 17, 1999. Claimant's Receipts for Repairs. Claimants finally provide a list of relevant repairs and some receipts.

At this juncture, it became apparent, given the high level of conflict, that further litigation over discovery would only serve to increase costs and delay for all parties. For this reason, the Court deferred ruling on the November 10, 1999, Claimants' Motion for Reconsideration and the November 17, 1999, Sanctions Motion. Subsequently, on November 23, 1999, the Court conducted a hearing on the merits of

the claim, and concluded that it should only be allowed in the amount of $459.00 as detailed in the subsequent Order on Debtor's Objection to Claim of Timmons Heirs entered on December 1, 1999.

The Court's decision was based upon three factors. First, the claim itself was not supported by any documentation (contracts, receipts and/or invoices), and the testimony and other evidence received on November 23, 1999, failed to shed any further light on the nature of the contractual relationship between the parties and the bases for claimed damages. Second, two of the Timmons Heirs, Mrs. Root and Mr. Pryor Timmons, had very limited knowledge of the relevant facts and damages asserted in the claim, and solely relied on their brother, Mr. John Timmons. Third, the Court found that, given evidence of the long-standing abysmal, uninhabitable condition of the home, and its age, that all other charges for the claimed repairs were derived from the neglect of the Timmons Heirs as the Debtor's landlords.

After finally reaching a decision on the merits, the Court concluded that it was appropriate to issue the subject Order to Show Cause and to simultaneously set for hearing the Debtor's Sanctions Motion. This step was taken based upon a review of the woefully deficient proof of claim, the failure to cure the deficiencies at the hearing on the merits, the apparent lack of any due diligence and/or personal knowledge on behalf of Mrs. Root and Mr. Pryor Timmons, and in view of the level of litigation required to adjudicate a common claims dispute in a routine chapter 13 proceeding.

Federal Rule of Bankruptcy Procedure 9011(b) provides in relevant part as follows:

> By presenting to the court .. . a petition, pleading, written motion, or other paper, an attorney or

unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,-

(1) it is not being presented for any improper purpose. such as to harass or to cause unnecessary delay or needless increase in the cost of litigation

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; . . . (emphasis supplied).

The purpose of the sanction provision is to deter litigation abuse and unnecessary filings, and to compensate parties that have been harmed. In re Addon Corp., 231 B.R. 385 (Bankr. N.D. Ga. 1999). In deciding to impose sanctions, courts must employ an objective standard and examine the reasonableness of the conduct under the circumstances, and the purpose of the filing of pleadings may be inferred from their consequences. In re Start The Engines. Inc., 219 B.R. 264, 270 (Bankr. C.D. Ca. 1998).

Courts have imposed upon creditors the obligation to make sure that there is some correct, factual basis for claims that are filed, like all other pleadings, and to make reasonable pre-filing inquiry as to their basis. In re McAllister, 123 B.R. 393, 395-97 (Bankr. D. Oregon 1991)(Oregon Department of Revenue sanctioned for filing precautionary claims for years debtor did not reside in state); In re Hamilton, 104 B.R. 525, 526-527 (Bankr. M.D. Ga. 1 989)(IRS sanctioned for filing a claim on taxes for years that they were not owed).

At the January 6, 2000, hearing the Court heard the statements of Debtor's Counsel, Mr. John

Timmons and Mrs. Root. Mr. Pryor Timmons did not attend the hearing. The Court finds based upon these statements that a reasonable inquiry was not made prior to the filing of the claim, and that indeed Mrs. Root and Mr. Pryor Timmons did not have any independent knowledge of the contents of their own claim. A reasonable inquiry would have dictated some explanation for the contractual basis for the claimed rental arrearage and the provision of invoices and/or receipts to evidence claimed damages and cleaning expenses. Finally, a reasonable inquiry on the part of the Timmons Heirs should have included some knowledge and recognition of the extremely poor condition of the home due to its age and significant structural problems. The Timmons Heirs simply filed a claim, and what ensued was the previously detailed flurry of litigation. The scope and intensity of litigation could have been reduced had the Timmons Heirs gathered and filed with their claim supporting data and scrutinized the condition of the home to determine what damages could fairly be attributed to the Debtor. For these reasons, the Court concludes that the Timmons Heirs, after failing to prevent confirmation of the plan, acted, through the filing of the proof of claim, to unnecessarily increase the costs of litigation in the hope to extract higher payment. For this reason, the Court has concluded the Timmons Heirs should be sanctioned, jointly and severally. Accordingly, within twenty days from entry of this Order, the Debtor shall file and serve a pleading that details the sanctions requested pursuant to FRBP 9011. Upon review, a separate order awarding sanctions will be entered.

IT IS SO ORDERED.

Date: MAR 2, 2000

/S/ Charles M. Caldwell
Charles M. Caldwell
United States Bankruptcy Judge

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re: Chapter 13
Case No. 99-52491
TIMOTHY SCOTT CASSELL SSN: 585-94-7987

ORDER ON DEBTOR'S OBJECTION TO CLAIM OF TIMMONS HEIRS

FILED, Clerk, November 30, 1999, 2:14 P.M.

Entered 12/1/99

This matter came on for hearing before the Court on November 23, 1999 upon the Proof of Claim of the Timmons Heirs in the amount of $7,750.00, Debtor's Objection to the Timmons Heirs Proof of Claim and the Timmons Heirs' request for hearing. The Court having received evidence and being fully advised in the premises, for good cause shown the Court hereby makes the following findings of fact and conclusions of law:

Debtor's Chapter 13 case was filed March 22, 1999, and the Timmons Heirs Proof of Claim was filed July 20, 1999. The said Proof of Claim contained no attachments in support of any of the elements of the debts claimed in the Proof of Claim. The elements so claimed are: $3,450.00 in rent arrearage; $3,500.00 in physical damages to the premises; $600.00 in lost rents; and $200.00 in costs of cleaning the premises. Debtor acknowledged, and the Court finds, that $259.00 for window repairs and $200.00 for clean-up are charges properly chargeable to Debtor. The Court further finds that two (2) of the Timmons Heirs, having testified regarding the Proof of Claim, have very limited knowledge regarding the debts set forth in therein. Further, the Proof of Claim is unsupported by a written lease or rental agreement setting forth the rents payable by the tenant or the tenant's and

landlord's respective responsibility for repairs and maintenance of the premises. The Court further finds that the receipts submitted by the claimant in support of the Proof of Claim do not substantiate the amount claimed, and that the testimony of witnesses is insufficient to establish liability of Debtor for the debts claimed. Further, the evidence, including photographs of the premises at issue establish that the condition of the premises is the result of the age of the premises and the neglect of its owner, for which Debtor is not chargeable.

On the basis of the Courts findings it is hereby Ordered that the Proof of Claim is allowed in the amount of $459.00, and that it is disallowed for all amounts in excess of $459.00, and that the Chapter 13 Trustee shall make payment upon said claim in accordance with this Order.

IT IS SO ORDERED.

Date: November 30, 1999 /s/ Charles M. Caldwell
(Entered 12/1/99) U.S. BANKRUPTCY JUDGE

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Ohio Revised Code

Ohio R.C. § 5301.11 Effect of destruction of building upon lessee.

The lessee of a building which, without fault or neglect on his part, is destroyed or so injured as to be unfit for occupancy, is not liable to pay rent to the lessor or owner thereof, after such destruction or injury, unless otherwise expressly provided by written agreement or covenant. The lessee thereupon must surrender possession of such premises.

Ohio R.C. Title 53, Chapter 5321, Landlord-Tenant

§ 5321.02 Retaliation of landlord prohibited

(A) Subject to section 5321.03 of the Revised Code. A landlord may not retaliate against a tenant by increasing a tenant's rent, decreasing services that are due to the tenant, or bringing or threatening to bring an action for possession of the tenant's premises because:

(1) The tenant has complained to an appropriate governmental agency of a violation of a building, housing, health, or safety code that is applicable to the premises, and the violation materially affects health and safety.

(2) The tenant has complained to the landlord of any violation of section 5321.04 of the Revised Code;

(3) The tenant joined with other tenants for the purpose of negotiating or dealing collectively with the landlord on any of the terms and conditions of a rental agreement.

(B) If a landlord acts in violation of division (A) of this section the tenant may:

(1) Use the retaliatory action of the landlord as a defense to an action by the landlord to reciver possession of the premises;

(2) Recover possession of the premises; or

(3) Terminate the rental agreement.

In addition, the tenant may recover from the landlord any actual damagestogether with reasonable attorneys' fees.

(C) Nothing in division (A) of this section shall prohibit a landlord from increasing the rent to reflect thee cost of improvements installed by the landlordin or about the premises or to reflect an increase in other costs of operation of the premises.

§ 5321.03 Actions by landlord authorized.

(A) Notwithstanding section 5321.02 of the Revised Code, a landlord may bring an action under Chapter 1923. Of the Revised Code for possession of the premises if:

(1) The tenant is in default in the payment of rent;

(2) The violation of the applicable building, housing, health, or safety code that the tenant complained of was primarily caused by any act or lack of reasonable care by the tenant, or by any other person in the tenant's household, or by anyone on the premises with the consent of the tenant;

§ 5321.04 Obligations of landlord.

(A) A landlord who is a party to a rental agreement shall do all of the following:

(1) Comply with the requirements of all applicable building, housing, health, and safety codes that materially affect health and safety;

(2) Make all repairs and do whatever is reasonably necessary to put and keep the premises in a fit and habitable condition;

(3) Keep all common areas of the premises in a safe and sanitary condition.

(4) Maintain in good and safe working order and condition all electrical, plumbing, sanitary, heating, ventilating, and air conditioning fixtures and appliances, and elevators, supplied or required to be supplied by him;

§ 5321.05 Obligations of tenant.

(A) A tenant who is a party to a rental agreement shall do all of the following:

(1) Keep that part of the premises that he occupies and uses safe and sanitary

(2) Dispose of all rubbish, garbagr, and other waste in a clean, safe, and sanitary manner

(3) Keep all plumbing ----------.

(4) Use and operate all electrical and plumbing fixtures properly.

(5) Comply with the requirements imposed on tenants by all applicable state and local housing, health, and safety codes.

(6) Personally refrain and forbid any other person who is on the premises with his permission from intentionally or negligently destroying, defacing, damaging, or removing any fixture, appliance, or other part of the premises.

§5321.07 Notice to landlord to remedy condition; deposit of rent with court or other remedies.

(A) If a landlord fails to fulfill any obligation imposed upon him by section 5321.04 of the Revised Code, other than the obligation specified in division (A)(9) of that section, or any obligation imposed upon him

by the rental agreement, if the conditions of the residential premises are such that the tenant reasonably believes that a landlord has failed to fulfill any such obligations, or if a governmental agencyhas found that the premises are not in compliance with building, housing, health, or safety codes that apply to any condition of the premises that could materially affect the health and safety of an occupant, the tenant may give notice in writing to the landlord, specifying the acts, omissions, or code violations that constitute noncompliance. The notice shall be sent to the person or place where rent is normally paid.

(B) If a landlord receives the notice described in division (A) of this section and after receipt of the notice fails to remedy the condition within a reasonable time considering the severity of the condition and the time necessary to remedy it, or within 30 days, whichever is sooner, and if the tenant is current in rent payments due under the rental agreement, the tenant may do one of the following:

(1) Deposit all rent that is due and thereafter becomes due the landlord with the clerk of the municipal or county court having jurisdiction in the territory in which the residential premises are located;

(2) Apply to the court for an order directing the landlord to remedy the condition. As part of the application, the tenant may deposit rent pursuant to (B)(1) of this section, may apply for an order reducing the periodic rent due the landlord until the landlord remedies the condition, and may apply for an order to use the rent deposited to remedy the condition. In any order issued pursuant to this division, the court may require the tenant to deposit rent with the clerk of court as provided in division (B)(1) of this section.

(3) Terminate the rental agreement.

§5321.12 Recover damages.

In any action under chapter 5321 of the Revised Code, any party may recover damages for the breach of contract or the breach of any duty that is imposed by law.

United States Code Title 11

USC Title 11 § 362. Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of---

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement -----. NA

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over the property of the estate.

(4) – (8) NA

(b) – (g) NA

(h) An individual injured by any wilful violation of a stay provided by this section shall recover actual damages, including costs and attorney's fees, and, in appropriate circumstances, may recover punitive damages.

USC 11 § 523. Exceptions to discharge

(a) A discharge under section 727, 1141, 1228(a), 1228(b), Or 1328(b) of this title does not discharge an individual debtor from any debt –

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by –

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

(6) for wilful and malicious injury by the debtor to another entity or to the property of another entity;

Restatement, 2d, Property, Landlord and Tenant

§ 21.1 In the event of bankruptcy of the lessee and if the tenant or his trustee rejects the lease, then the landlord may: (1) Retake possession of the leased property. (2) recover rent to the date of the filing of the petition in bankruptcy; (3) recover compensation for the use and occupancy of the leased property by the tenant or his trustee following the tenant's filing of the petition in bankruptcy; and (4) recover damages to the extent allowed by the bankruptcy act.

Selections from the Claims Hearing that was held November 23, 1999

Cassell on cross-examination by John Timmons

Q. "When you did fill up the tank, let's say, did that then run for one week, two weeks, a month?

A. One hundred and fifty gallons would last for about a month.

Q. About a month?

A. Yes.

Q. How often did you fill that tank the last four or five years? Did you mainly use -- what form of heat in the house?

A. Wood stove and kerosene heaters.

Q. So you didn't use the furnace in the basement at all?"

A. Yes, we did, but you asked me what we mainly used.

Q. Mainly used upstairs?

A. Yes." (Transcript pg. 74-75)

Cassell on direct by his attorney David Korn, Esq.

Q. As a result of the plumbing setup and heating setup, was there any problem with usage of the water in the winter?

A. Yes. There was a problem with the kitchen plumbing, it would freeze just about every year. There was one pipe that ran up the northwest wall of the house, it wasn't insulated, the wall, that is, nor the pipe, and it was an almost annual rite that that would freeze, and I would have to go down and thaw it out and replace that myself or wait until summertime.

Q. Didn't your landlord come over and fix his frozen pipes?

A. Occasionally. I think maybe once or twice in the first couple of years, then it just got to where it was easier and would take much less time for me to do it myself than to have John over there.

Q. What procedure did you follow in order to fix the frozen pipe problem?

A. As far as when John would repair it?

Q. No, you.

A. I would get a hacksaw and cut the broken section of the pipe down in the cellar and go up into the

kitchen and underneath the kitchen sink, I would hacksaw the top end of the pipe and I would pull it either down or up, depending on the length and the qualities of the repair, and I would get some glue and buy a new piece of pipe and stick it on there.

Q. You did this at your own expense?

A. Yes.

Q. You have just described pipe replacement?

A. Yes.

Q. So I assume when the pipe froze, it also burst?

A. Yes.

Q. So it would leak if you didn't do the replacement

A. Yes, if it would thaw, it would leak, yes.
(Transcript pg 44-45)

Testimony of Cassell on direct by his Attorney

Q. Are you familiar with an expense that has been claimed by the Timmons' Heirs for a toilet, $83.55, purchased at Lowe's?

A. I think that seems a little high for a toilet, you can get them for $40.

Q. Did you break the toilet?

A. No.

Q. Did you do anything to cause damage to the toilet?

A. Not to my knowledge.

Q. To your knowledge, is the toilet broken?

A. Yes, the toilet is broken.

Q. Really. When did it break?

A. It was broken sometime in January.

Q. January of 1999?

A. Yes.

Q. And do you know what caused the toilet to break?

A. It appeared there had been water in the tank and it had frozen, and expanded and broken the tank.

Q. So when you testified earlier that the water had to be shut off in January of 1999, the water was still shut off because of that sunken bathtub?

A. Yes. (Transcript at pg. 57)

Cassell on cross-examination by John Timmons

THE COURT: Mr. Timmons, what are we after here?

JOHN TIMMONS: His contention is that he had to go to a hotel to clean up after the damage had been done. My contention is that he didn't have to go to a hotel but he went out, partied and then got a room to stay the night so he wouldn't be picked up for drunk driving the next day. A lot of times, he would come back Sunday morning after being out all night ---

THE COURT: Mr. Timmons, I am not going to allow that questioning. Let's stay focused on the claim in the objection, please.

JOHN TIMMONS: Well, part of the reasoning is that he didn't have the money to pay his rent because he was having to go to the hotels. (Transcript pg. 69)

Q. Mr. Cassell, you say you stayed in a motel because you didn't have water in the bathroom; is that right?

A. Yes.

Q. When was that, when did you first start staying in that motel?

A. The winter of 1997.

Q. Winter of '97?

A. Yes.

Q. What motel was that?

A. That was a different motel, different motels, sometimes it was the Ramada Inn in Grove City, sometimes it was the Shady Manor Motel on High Street.

Q. In 1997, you had water in your bathroom?

A. Sometimes.

Q. Did you have problems with the plumbing before, I mean, 1997?

A. Yes.

Q. I mean, in 1997, you started staying in motels because you didn't have any water?

A. Late '97, early '98, yes.

Q. You are saying then that the water stopped working in 1998, though, I think your testimony was?

A. The water stopped working a number of times over the years.

Q. Did you pay the motel bill?

A. Yes.

Q. You don't have the receipts here?

A. No.

Q. How much did the motel cost usually?

A. As I testified earlier, somewhere between $25 and $50 per night.

Q. And you had to have a motel because you didn't have any way to take a shower or clean up for work; is that it?

A. Yes. (Transcript at pgs 77-78).

THE COURT: What bearing does it have, the question you asked?

JOHN TIMMONS: The bearing is that Mr. Cassell is trying to make a case he had to rent the motel for hygienic purposes. My case is that there may have been some other reason.

THE COURT: Why don't you ask him that? If you wish to ask him that directly.

BY JOHN TIMMONS:

Q. Did you, Mr. Cassell -- what would happen if you -- would you ever lose your license, what would happen to your job?

A. I would lose my job.

Q. So your license, your job depends upon having a license to drive a car?

A. Yes.

Q. When you drive, do you drive all the time or do you sometimes have your friends drive?

MR. KORN: Objection. I still don't see that this question, or any conceivable answer to that question, would have any bearing whatsoever on the matter at issue.

THE COURT: What are you trying to get at, Mr. Timmons?

JOHN TIMMONS: If I do, I can say this in my own testimony, but what I am saying is that Mr. Cassell has had some problems, I believe, and to keep from being picked up, he has had to rent the motels. (transcript, pages. 80 – 81)

<u>Cassell cross examination continued</u>

THE WITNESS: Yes, I mowed the lawn.

BY JOHN TIMMONS:

Q. Did you mow it every week, every two weeks, every four weeks?

A. I mowed it when it needed it.

Q. Did you do that up to the time you left the house?

A. Yes. (Transcript pg 71)

Cassell cross-examination continued

Q. It must have been put in some other time. Did -- you state, though, in 1997, you stayed in this motel, but in 1998, you were having problems with the water supply and it was cut off; is that right?

A. Yes.

Q. Well, there's one other thing. On the condition, the grounds around the house, did you ever clean up the yard, the trash, did you bring a dumpster in?

A. Yes.

Q. Did you pick everything up and throw it into the dumpster?

A. Yes. I will admit, the house on the grounds were not left in pristine condition by any means. I realize they were left dirty and some trash and stuff, and I have no problem with paying the $200 you claimed in your claim for that cleanup. (Transcript at 83 – 84)

Direct Testimony of John Smith by John Timmons

Q. What condition would you say, would you describe the yard?

A. Actually, it was never really taken care of. The grass was never mowed, weeds growing all over the place. There was some kind of vines or something, could have been poison ivy vines growing up through the shingles of the house. A lot of weeds, in bad shape.

Q. Did you ever see any trash in the yard?

A. Yes.

Q. Did you see trash in bags and tires?

A. Yes, it was quite a bit of trash lying around.

Q. Did it appear like the yard had ever been mowed?

A. Not really.

Q. All right. He has been there for eight years, the possibility was it was mowed, but you didn't see it?

A. Yes, I would say it could be a possibility.

Q. Did you see plastic on the windows?

A. Yes, there was plastic on the windows.

Q. And those windows were covered usually in the countryside, sometimes people cover windows with plastic; is that correct?

A. Yes.

Q. Why is that?

A. Because they don't have no windows in there.

Q. There were no windows -- did you go around and look in the house to see what windows were broken?

A. No.

Q. You did not?

A. No. I did not actually physically go in and look around and walk around and look at the windows.

Q. But you did see from outside, there were broken windows?

A. Yes, you could see several windows out there in the front when pulling up into the driveway, probably six or eight windows in front of the house, and I would say, a good portion of those was gone.

Q. Would you say that is normal?

A. No.

Q. Would you say the house would be drafty?

A. Extremely drafty out there in the country, yes.

Q. How long do you think those windows have been broken?

A. I really don't know. You got a lot of water that is damage on the window seals, on the windows, so I imagine some of those windows have probably been broken for a few years. (Transcript at pgs 94-96)

Direct Examination of Mike Nickell by John Timmons

JOHN TIMMONS: Your Honor, I believe it would be relevant from the standpoint, if the yard suppose -- supposedly, Mr. Cassell vacated the premises in January.

THE COURT: I am going to allow the question.

BY JOHN TIMMONS:

Q. Could you testify according to the condition of the yard?

A. Very poor, very bad shape, probably six or seven feet high.

Q. Grass and weeds were six and seven feet tall?

A. Yes.

Q. Did you see trash any place?

A. Yes, there was trash in the house, trash out in the yard.

Q. Did you -- Mr. Cassell evidently had several things in the yard, and when you were trying to clean up the yard, did you break the mower?

A. Yes, I broke something like that.

Q. You had to take the bush hog?

A. Yes.

Q. A big tractor, and clean up the yard?

A. Right.